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**TRANSNATIONAL FORCE OF LAW**

unter der Leitung von Andreas Fischer-Lescano

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TRANSNATIONAL FORCE OF LAW (gefördert durch den European Research Council)  
Universität Bremen — Zentrum für Europäische Rechtspolitik  
Büro: Mar Escudero Morón • Telefon +49(0)421 218-66 201 • Fax +49(0)421 218-66 230  
Universitätsallee GW1 • 28359 Bremen

[www.tfl.uni-bremen.de](http://www.tfl.uni-bremen.de)

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## On the critical potential of law – and its limits

### *Double fragmentation of law in Chevron Corp. v. Ecuador*

HANNAH FRANZKI AND JOHAN HORST

#### Introduction

The Tribunal hereby orders: the Respondent (whether by its judicial, legislative or executive branches) to take all measures necessary to suspend or cause to suspend the enforcement and recognition within and without Ecuador of the judgment by the Provincial Court Sucumbíos . . . against the First Claimant in the Ecuadorian legal proceedings known as the Lago Agrio Case. . .<sup>1</sup>

An arbitration award, even though it might be binding for Ecuador, can neither force judges to violate the human rights guaranteed by the constitution, nor can it expect them to disregard obligations emanating from international human rights treaties.<sup>2</sup>

The first statement above was issued by an arbitration panel convened under the rules of the United Nations Commission on International Trade Law (UNCITRAL) to decide a dispute between Chevron Inc. and the State of Ecuador; the second one is a response, published the following day, by the Provincial Court of Justice of Sucumbíos, Ecuador. Both decisions are pieces of a jigsaw puzzle encompassing several legal disputes that followed the oil production of Texaco (now Chevron) in the Ecuadorian rain forest. In February 2011, the Ecuadorian court in Sucumbíos ordered Chevron to pay \$18 billion worth in compensation to those affected by the environmental pollution and related health problems, a verdict which was later reduced by the High Court to \$9.5

<sup>1</sup> *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, UNCITRAL; PCA Case No. 2009–23 (all further references do documents of this case with full title and PCA Case No. omitted), Second Interim Award, p. 3.

<sup>2</sup> Corte Provincial de Justicia de Sucumbíos, *Aguinda y otros v. Chevron*, Statement on Interim Award. p. 3 (our translation).

billion.<sup>3</sup> While the arbitration tribunal claims it has the authority to order the Ecuadorian government to suspend the sentence, the Ecuadorian court, in turn, holds that the government is equally bound by national and international law to protect the human rights of its citizens. To demand that the government must suspend the judgment would not only interfere with the judicial independence, but also result in the violation of the rights of those whose suffering is remedied by the Ecuadorian judgment.

The interim award in *Chevron Corp. v. Ecuador* is one of many cases in which arbitration tribunals *de facto* decide upon the situation of a population that is not party to the legal dispute. In this chapter, we discuss the legal disputes emanating from the conflict following Texaco's oil production as an example of a larger set of cases in which investment disputes affect the rights of third parties. These cases usually present themselves as a collision between the rights of those affected by large-scale investment projects on the one hand, and the rights of investors on the other. This collision, we will argue, testifies to a double fragmentation in transnational law, which affects how law frames and decides underlying social conflicts.

The first fragmentation denotes the fragmentation of transnational law into different legal regimes. Rather than constituting a mere collision between conflicting jurisdictions – understood in the traditional way of legal competence – the case of *Chevron Corp. v. Ecuador* should be understood as the result of this fragmentation. This perspective focuses on the different logics and rationales underlying the respective legal regimes: with transnational investment law aiming at offering transactional security and shaped by classical and neoclassical notions of free trade and movement of capital on a global scale, it institutionalises a very specific paradigm of political economy which postulates the free market and private property as a basis for economic growth and, related hereto, wealth. While historically human rights law has been closely related to the institution of private property, it has also served to exempt areas of society from the rationale of the market (cf. Sonja Buckel's contribution in this volume). Thus the collision of human rights law and investment law is not a mere conflict of jurisdictions but a collision of different legal rationalities. If transnational human rights law is to remedy the negative consequences of large-scale investment projects, then, to merely include

<sup>3</sup> Barrett, 'Amazon Crusader'.

it into the legal regime of investment protection – as the dominant business and human rights approach seems to suggest – would only make human rights subject to the very logic of investment protection. Rather, a human rights approach to investment arbitration should demand a self-restriction of investment law, that is, arbitration panels should abstain from rendering a decision where rights and interests of third parties are affected.

The second and more fundamental fragmentation manifest in *Chevron Corp. v. Ecuador* concerns the relationship between law and its other, the non-law. To understand the suffering of the affected population as human rights violations, or even the idea of the *afectados* as an actually existing group, is already a perspective onto the social as construed by law. In the second part of this chapter we set out to explore this second fragmentation.

We close this chapter arguing that in the face of the double fragmentation, the emancipatory potential of law in the context of social conflict comes to fruition only if it reflects this double fragmentation by what – evoking Walter Benjamin – could be called a double ‘deposition’ (*Entsetzung*) of law. Before we start with the analytical part of the argument, we advance the central aspects of the legal disputes, which followed the oil drilling activity in Ecuador, in order to set the scene for the analysis.

### Chevron Corp. v. Ecuador: *the context*

The arbitration dispute under UNCITRAL rules needs to be understood in the context of a lengthy litigation process that started in 1993. US lawyer Stephen Dozinger filed a class action lawsuit in the name of a group of people affected by the oil production of Texaco (the *afectados*), demanding damages suffered by the population in the Ecuadorian Amazon region where Texaco had drilled for oil. He argued that:

As a direct and proximate result of defendant’s breaches of duty, plaintiffs and the class have suffered injuries to their persons and property. Plaintiffs and the class are entitled to recover compensatory and punitive damages in amounts to be ascertained at trial.<sup>4</sup>

One year earlier, in 1992, the concession treaty between the Ecuadorian government and the company had expired, leaving the local population

<sup>4</sup> *Maria Aguinda et al., v. Texaco Inc.*, District Court for the Southern District of New York, Complaint of 3 November 1993, p. 29.

with the remainders of thirty years of oil exploitation – open pits, oil spillages, and health damage. The responsibility of Texaco (which was bought in 2001 by Chevron Corp.) for health and environmental damages is, by now, subject to a range of legal disputes all of which are linked to the class action suit filed in 1993. In 2002, nine years after the suit was first presented, the federal court in New York dismissed its jurisdiction on the grounds of a *forum non conveniens* rationale, arguing that the claim should be brought before an Ecuadorian court, as long as both parties would subject themselves to Ecuadorian jurisdiction. The claimants thus filed a lawsuit with the Court in Lago Agrio (Province of Sucumbíos), which issued a judgment in 2011, obliging Chevron to pay around \$10 billion in reparations and compensation.<sup>5</sup> Legal grounds for the claim were, in addition to Ecuadorian tort law and Article 15 of the International Labour Organisation (ILO) Convention No. 169, the Ecuadorian constitution. The latter grants the collective right to a clean and healthy environment, the violation of which enables citizens to file a legal complaint. Furthermore, the bill on environmental management, adopted in 1999, allows any citizen to denounce a breach of its regulations. Thus, one central and contested aspect of the Lago Agrio trial was the degree of the environmental and health damage produced by the oil production. Over the course of the proceedings, more than hundred, often mutually contradicting, expert reports were produced. By the time the judgment was handed down, Chevron had already withdrawn its assets from Ecuadorian soil so that the claimants now seek to enforce the judgment abroad.<sup>6</sup>

Chevron, for its part, embarked on two different legal strategies to fight the decision made by the Ecuadorian court.<sup>7</sup> Based on the ‘Racketeer Influenced and Corrupt Organizations Act (RICO-Act)’, they filed a claim against the lawyers of the *afectados* in the United States, arguing that the lawyers had conspired to win the claim in Ecuador through illegal practices. In the decision published in March 2014, Judge Kaplan ordered an injunction after finding that the ‘decision in the Lago Agrio

<sup>5</sup> Judgment No. 2011-0106, Sala Única de la Corte Provincial de Sucumbios, 3 January 2012 (Spanish). The judgment was approved by the Court of Appeals; see judgment of the Corte Nacional de Justicia, Aguinda, 12 November 2013.

<sup>6</sup> Lawyers for the plaintiffs have sought to enforce the judgment in Brazil, Argentina and Canada, so far without success. For the latest developments see Noronha, ‘Ecuadorian Chevron Oil Pollution Case’.

<sup>7</sup> See for an overview of the different legal proceedings: Dhooze, ‘*Aguinda v. Chevron Texaco*’.

case was obtained by corrupt means’ and that ‘defendants here may not be allowed to benefit from that in any way’.<sup>8</sup> In addition, even before the Ecuadorian court had published its decision, Chevron initiated (in 2009) a UNCITRAL arbitration proceeding against Ecuador with the aim to prevent courts from enforcing the Ecuadorian judgment.<sup>9</sup> The decision in the Lago Agrio case, they argued, violates the rights protected by the bilateral investment treaty between Ecuador and the United States from 1993.<sup>10</sup> In a nutshell, Chevron held that in 1995, Texaco and Ecuador had signed a settlement agreement that released Texaco (and hence now Chevron) from any further claims regarding the environmental pollution caused in Ecuador. By now, the arbitration tribunal has published five decisions and interim measures according to Article 26 (1) UNCITRAL rules,<sup>11</sup> namely four Interim Awards<sup>12</sup> and one Partial Award.<sup>13</sup> In its first Interim Award on Interim Measures, published on 25 January 2013, the tribunal ordered Ecuador to impede the enforcement of the Lago Agrio Judgment in Ecuador. Once the plaintiffs sought to enforce the judgment abroad, the tribunal extended the order so that Ecuador should also impede the enforcement in other countries.<sup>14</sup> The political and legal tensions arising from this decision are at the core of this chapter.

### Beyond jurisdiction

Plaintiffs, lawyers and many commentators have celebrated the judgment in the Lago Agrio case as successful precedent to hold companies legally accountable for the negative consequences of their operations.<sup>15</sup> With the pending arbitration proceedings, however, there seems to be the possibility that the panel will decide in favour of Chevron and oblige the Ecuadorian government to prevent the judgment from being enforced. The interim

<sup>8</sup> United States District Court Southern District of New York, *Chevron Corp. v. Stephen Donziger, et al.*, 11 Civ. 0691 (LAK), Opinion, 4 March 2014, p. 484.

<sup>9</sup> For a general overview over the various litigations, see Dhooge, ‘*Aguinda v. Chevron Texaco*’.

<sup>10</sup> Treaty between the United States and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment.

<sup>11</sup> On Article. 26 UNCITRAL Rules cf. Caron and Caplan, *The UNCITRAL Arbitration Rules*, chapter 17.

<sup>12</sup> Fourth Interim Award on Interim Measures, 7 February 2013.

<sup>13</sup> First Partial Award on Track, 17 September 2013.

<sup>14</sup> Second Interim Award on Interim Measures, 16 February 2012; Fourth Interim Award on Interim Measures, 7 February 2013, No. 80.

<sup>15</sup> E.g., Vogt, ‘Urteil Ecuador vs. Chevron’.

awards and the first partial award issued so far raise several questions. As indicated earlier, the arbitration panel establishes its own jurisdiction assuming the authority to oblige Ecuador to suspend the local court's judgment. Such a judgment would effectively leave the *afectados* without remedies.

The arbitration tribunal, however, avoids dealing with this contradiction in that it excludes the *afectados* from its jurisdiction. As a result, the fact that the Lago Agrio case and the arbitration proceedings both deal with the same problem while demanding different actions is not perceived as a legal problem for the arbitrators. A close look at the awards reveals the legal reasoning that enables this move. In its submission to the arbitration panel, the Ecuadorian government had pointed out the legal conflicts that would emerge if it were to be obliged to suspend the Lago Agrio judgment. It put forward two central arguments to counter Chevron's demand. First, it argued that if it had to suspend the judgment it would violate the procedural rights of the *afectados* that are granted by international human rights treaties and the Ecuadorian constitution. It demanded that the UNCITRAL tribunal consider the rights of the *afectados* by acknowledging that Ecuador had to comply with international human rights treaties.<sup>16</sup> The second argument put forward by Ecuador is based on the Monetary Gold<sup>17</sup> principle, according to which a court has no jurisdiction where the decision necessarily concerns third parties that are not part to the proceedings before it.<sup>18</sup> This principle has also been applied in investment disputes. Hence, Ecuador held that any decision made by the arbitration panel effectively affected the rights of the *afectados*, which meant that the UNCITRAL tribunal lacked jurisdiction.<sup>19</sup>

As indicated above, the arbitration panel did not follow the Ecuadorian submission but ordered 'the Respondent to take all measures at its disposal to suspend or cause to suspend the enforcement or recognition within and without Ecuador of any judgment against the First Claimant in the Lago Agrio Case'.<sup>20</sup> The legal foundations for the tribunal's position

<sup>16</sup> Track 2 Counter-Memorial on the Merits of the Republic of Ecuador, 18 February 2013, No. 486ff. and No. 493ff.

<sup>17</sup> Ibid., No. 515ff. <sup>18</sup> ICJ Rep. 1954, 19.

<sup>19</sup> Track 2 Counter-Memorial on the Merits of the Republic of Ecuador, 18 February 2013, No. 525.

<sup>20</sup> First Interim Award on Interim Measures, 25 January 2012. This decision was re-affirmed in the 2nd and 4th interim awards, see Second Interim Award on Interim Measures, 16 February 2012, and Fourth Interim Award on Interim Measures, 7 February 2013, No. 80



‘that it has jurisdiction to proceed to the merits phase of these arbitration proceedings’<sup>21</sup> are spelled out in the third interim award.<sup>22</sup> In relation to the Monetary Gold principle referred to by the Ecuadorian government, the arbitrators distinguished several dimensions, two of which are of importance in the context of this chapter.<sup>23</sup> For one, it affirmed the principle of consent according to which a tribunal did only have jurisdiction over a party insofar as it had subjected itself to it. Consequently, it found that in the present case, the tribunal did not have jurisdiction over the *afectados*. Second, the tribunal agreed that it would not have jurisdiction if its decision affected an ‘indispensable third party’. However, in its view, the *afectados* did not constitute an ‘indispensable third party’ to the dispute dealt with by the tribunal.<sup>24</sup> This is because it had to decide on the rights and obligations emanating from the bilateral investment treaty in general, and in particular whether the 1995 Settlement Agreement between Texaco and Ecuador freed Chevron from any further obligations regarding the damages produced by the oil drilling.<sup>25</sup> While the panel recognised that the arbitration award might indeed affect the rights of the *afectados*, it maintained that this tension would have to be dealt with by the Ecuadorian government and was not a responsibility of the tribunal.<sup>26</sup> The tribunal concludes:

The question for this Tribunal is in essence whether the Respondent has or has not violated rights of the Claimants under the BIT because of the way in which the Respondent has, through its organs, acted in relation to the settlement agreements. The question is one of the rights and obligations existing between the Claimants and the Respondent; and the Lago Agrio plaintiffs, who are not parties to the settlement agreement or to the BIT, do not have rights that are directly engaged by that question. If it should transpire that the Respondent has, by concluding the Release Agreements, taken a step which had the legal effect of depriving the Lago Agrio plaintiffs of rights under Ecuadorian Law that they might otherwise have enjoyed, that would be a matter between them and the Respondent, and not a matter for this Tribunal.<sup>27</sup>

<sup>21</sup> Third Interim Award on Jurisdiction and Admissibility, 27 February 2012, 5.2.

<sup>22</sup> While in the third interim award the Tribunal applies a *prima facie* standard that means that the decision is not final, the Tribunal in its first partial award has affirmed the latter. On the *prima facie* principle, cf. Third Interim Award 4.3ff., on the incorporation of the third interim award in the first partial award see UNCITRAL, *Chevron v. The Republic of Ecuador*, 17 December 2013, No. 2.

<sup>23</sup> See Third Interim Award 4.59ff. <sup>24</sup> See Third Interim Award 4.65.

<sup>25</sup> See Track 2 Counter-Memorial on the Merits of the Republic of Ecuador, 18 February 2013, No. 323ff.

<sup>26</sup> Third Interim Award 4.67. <sup>27</sup> Third Interim Award 4.70.

This close look at the doctrinal reasoning of the tribunal allows us to refine our understanding of the way in which the collision presents itself. Rather than colliding interests within one legal regime – that is between rights of the *afectados* on the one hand and the rights of the investors on the other – the *de facto* collision of interests is legally resolved by ignoring what the respective legal regimes find to be beyond their jurisdiction. There is no conflict of interest as far as the rationale of the arbitration tribunal goes, because it does not have jurisdiction over the *afectados*. As a consequence, the rights and interests of the *afectados* are expelled from the arbitration proceedings. At the same time, the Ecuadorian court affirms its jurisdiction over the claims of the *afectados*. At present, there is no legal norm or institution that could decide these competing jurisdictional claims. Rather, each legal forum decides on the scope of its own jurisdiction. What we can observe then is a multipolar conflict of jurisdictions within a heterarchical order.

However, while *legally* there is no hierarchy between these jurisdictions, they are of course embedded within the relationship of forces that characterise the present world order. This is especially true for transnational investment law. Especially post-colonial approaches to international law have pointed out that the legal protection of foreign investment has developed in the context of decolonisation and served primarily the interest of capital exporting countries.<sup>28</sup> In this vein, Kate Miles reminds us that

it is of fundamental importance to the shape and character of international investment law that the context in which its principles were developed was one of exploitation and imperialism. The rules evolved so as to advance the interests of Western capital-exporting states engaging with the non-European world, and, as such, they protected only the investor.<sup>29</sup>

Furthermore, contributions from the field of (heterodox) international political economy have pointed out that the sedimentation of neoliberal principles in transnational investment law restricts the policy options that can be adopted within nation states.<sup>30</sup> Against this backdrop, we

<sup>28</sup> Anghie, *Imperialism, Sovereignty and the Making of International Law*, pp. 196ff.; Pahuja, *Decolonising International Law*, pp. 95ff.

<sup>29</sup> Miles, 'International Investment Law', p. 10.

<sup>30</sup> See Gill, 'Constitutionalizing Inequality and the Clash of Globalizations', pp. 60–1; Schneiderman, 'Investment Rules and the New Constitutionalism', pp. 757ff.; Schneiderman, *Constitutionalizing Economic Globalization*; Möller, 'Global Assemblages im neuen Konstitutionalismus', pp. 48–9.

have to contextualise jurisdictional conflicts within competing (globalised) economic and political projects.

### Jurisdiction otherwise or the problem of double fragmentation

Practitioners and academics have tried to address this problem of conflicting jurisdictions under the heading of ‘human rights approaches to investment’.<sup>31</sup> This debate explores doctrinal arguments to consider rights of third parties within investment law.<sup>32</sup> Despite their differences, these proposals essentially attempt to remedy the jurisdictional conflict between arbitration panels and other adjudicatory bodies by developing doctrinal arguments that require arbitration tribunals to take into account the rights of third parties. *Inter alia*, they point out that according to Article 31 of the Vienna Convention on the Law of Treaties, arbitration panels have to consider human rights while interpreting investment treaties<sup>33</sup> or they propose that investment tribunals consider human rights of third parties as part of a balancing or proportionality test.<sup>34</sup> Such proposals are not without merit. However, as we already alluded to in the previous section, the tribunal’s jurisdictional considerations in *Chevron Corp. v. Ecuador* also point to a collision that is much more fundamental than a conflict of jurisdictions.

#### *First fragmentation: investment law versus human rights law*

Traditional jurisdictional thought presents jurisdiction as something that follows from an authority established otherwise (in the present case, the arbitration tribunal claims that its authority is based on the consent of the parties). Within this theoretical framework, conflict, territory and subjects are already there when the law enters the stage. From the margins of jurisdictional thought, however, we are reminded that jurisdiction ‘refers first and foremost to the power and authority to speak in

<sup>31</sup> *Inter alia*: Reiner and Schreuer, ‘Human Rights and International Investment Arbitration’, pp. 83–4; Simma and Kill, ‘Harmonizing Investment Protection and International Human Rights’, pp. 695ff.; Simma, ‘Foreign Investment Arbitration’, pp. 584ff.; Davitti, ‘On the Meanings of International Investment Law and International Human Rights Law’; Krommendijk and Morijn, “Proportional” by What Measure(s)?’.

<sup>32</sup> See Petersmann, ‘International Rule of Law and Constitutional Justice’.

<sup>33</sup> Simma and Kill, ‘Harmonizing Investment Protection and International Human Rights’, pp. 695ff.

<sup>34</sup> Krommendijk and Morijn, “Proportional” by What Measure(s)?’.

the name of law'.<sup>35</sup> From such a perspective, jurisdiction refers to a double movement of creating and re-affirming authority.<sup>36</sup> 'At the jurisdictional threshold', Bradin Cormack writes, 'the law speaks to itself, and in a mirror *reproduces* as administration the juridical order that it simultaneously *produces*'.<sup>37</sup> To think about jurisdiction as a 'first question of law',<sup>38</sup> that is as a problem of authorisation of legal worlds and not merely as a technical question of competence, enables us to perceive 'how rival forms and accounts of political authority and ways of belonging to law are enacted and performed over the same people and the same places at the same time'.<sup>39</sup> From this perspective, it becomes necessary to revise the doctrinal approaches mentioned above as they fail to account for the fact that the collision at stake involves fundamentally different ways of 'belonging to law'. For the jurisdictional conflict is only the epiphenomenon of a more fundamental collision of different legal regimes, each of which reproduces (in the sense of both to repeat and to produce) the specific logic of a functional system. Only at a first glance does the jurisdictional conflict take place between an international body (the arbitration tribunal) and a national court – defined by territorial parameters. The jurisdiction of international investment law constitutes the juridification of a particular global economic order. It serves the protection of foreign direct investment. To guarantee transaction security by means of legal protection, the story goes, is necessary in order to attract foreign investment, which in turn is required to secure economic prosperity. Transnational investment law thus reproduces a particular economic logic, which has informed wide areas of global economic law. This insight on the relationship between economic law and a particular transnational economic order is by no means original and has been the subject of a number of investigations. In a similar vein, the very basic assumptions on which this economic order is grounded (free trade as means to archive global economic wealth) have been contradicted on an empirical as well as theoretical level.<sup>40</sup>

<sup>35</sup> Rush, 'An Altered Jurisdiction', p. 150.

<sup>36</sup> Matthews, 'From Jurisdiction to Juriswriting', pp. 4–5.

<sup>37</sup> Cormack, *A Power to Do Justice*, p. 9.

<sup>38</sup> Matthews, 'From Jurisdiction to Juriswriting', p. 3.

<sup>39</sup> Pahuja, 'Laws of Encounter', p. 71.

<sup>40</sup> Recently the UNCTAD found for example that 'BITs appear to have no effect on bilateral North-South FDI flows': UNCTAD, Trade and Development Report, 2014 (UNCTAD/TDR/2014), 159. That means that it is rather doubtful whether the signing of Bilateral Investment Treaties has a positive economic effect for so-called developing countries.

The UNCITRAL panel operates within the parameters of this particular economic rationale – the protection of private property, fostering economic development through foreign investment, the maximisation of profit. Accordingly, if it is confronted with the claim that the *afectados* have rights to be protected from the impact of foreign investment, it is confronted with a completely different logic. Any attempt to protect the rights of those affected by foreign investment by means of transnational investment arbitration merely subjects them to the economic rationale that shaped the regime of investment law. They would become mere receivers of law (rights) within a jurisdiction that produces/authorises a world that is centred around the principle of private property and expected profit. The investment arbitration tribunal construes the problem at stake according to its own logic so that other jurisdictional claims are not even perceived. This is epitomised by the following statement:

... from its perspective under international law, this Tribunal is the only tribunal with the power to restrain the Respondent [Ecuador, the authors] generally from aggravating the Parties' dispute and causing irreparable harm to the Claimants [Chevron Corp., the authors] in regard to the enforcement and execution of the Lago Agrio Judgment.<sup>41</sup>

From the perspective of investment law, the rights of those affected by investment projects constitute an obstacle or threat to the smooth functioning of the regimes logic. Human rights of third parties can enter investment treaty arbitration only in the form of a disturbing exception to the rule of investment protection. To address the regime collision by expanding the jurisdiction of the investment arbitration panel over the rights of affected third parties therefore means to frame the conflict in a very specific way: human rights of third parties are only acknowledged within the narrow boundaries of a very specific regime logic. Against this background the call for consideration of human rights in investment treaty arbitration, intended to mitigate the negative effects of investment arbitration proceedings, in fact expands the reach of this regime's logic.<sup>42</sup>

A human rights approach to investment has to take into account that considering rights of third parties within the framework of investment treaty arbitration is not a neutral process. First, investment arbitration panels are not fit to balance human rights with rights of investors because

<sup>41</sup> Fourth Interim Award, No. 82.

<sup>42</sup> See for a similar argument with respect to the lack of transparency and legitimacy of investment arbitration proceedings: Reiner and Schreuer, 'Human Rights and International Investment Arbitration'.

they consider human rights only within the specific and narrow economic rationale of a neoclassical free trade agenda. Second, the delimitation of jurisdiction is also an expression of power asymmetries between the different legal regimes of world law. Thus, including human rights of third parties into investment arbitration proceedings may not lead to a consolidation of those rights in conflicts with investor rights. It would rather mean that a structurally biased adjudicatory body would decide over rights of persons, who have never agreed to such panels and who have no standing in front of them.

A human rights approach to investment arbitration should therefore not demand that arbitration panels consider human rights of third parties as part of their jurisdiction. Instead, the demand should be primarily that arbitration panels abstain from rendering a decision where rights and interests of third parties are affected. This self-restrictive determination of its own jurisdiction would leave it to other forums of world law to deal with the underlying conflicts according to a logic not serving merely the logic of capital. We will discuss this suggestion in more detail in the last section of this chapter. Before doing so, we will turn to what we call the second fragmentation of law which becomes manifest in *Chevron Corp. v. Ecuador*.

*Second fragmentation: the collision between law and non-law*

The intuitive answer to this analysis would be to call upon a different legal regime, such as human rights law or environmental law, to deal with the conflict. While these regimes indeed embody a different social logic than investment law, they are not without their own problems. The process of translating a social conflict into the legal language has its own costs, even for those for whom the protective umbrella of human rights is meant. In addition to the first fragmentation, which concerns the fragmentation of law into different legal regimes, we can identify a second fragmentation affecting the relationship of law to its other, to that which is non-law.<sup>43</sup>

As with the first fragmentation, we take the notion of a second fragmentation of law from Gunter Teubner and Andreas Fischer-Lescano. The second fragmentation of law refers to collisions between modern law and normative concerns emerging from indigenous cultures.<sup>44</sup> From the perspective of systems theory, Teubner and Fischer-Lescano summarise

<sup>43</sup> For an in-depth discussion of this relationship see Menke in this volume.

<sup>44</sup> Teubner and Korth, 'Zwei Arten des Rechtspluralismus'.

the problems arising from strategic litigation with the aim of protecting indigenous knowledge as follows: ‘The real problem behind these litigation strategies lies in their issue framing. What are the categories in which politics and law in the centres of modernity perceive the problem of traditional knowledge in peripheral societies?’<sup>45</sup> Still, if the aim is to put limits to the economic exploitation of indigenous knowledge, it is necessary to translate non-legal categories and needs into the language of law.<sup>46</sup> The legal fiction of indigenous ‘customary law’ is one example, we hold, for how this can be done. Here, the so-called modern law, transforms ‘communication from a local culture’ into ‘formal legal acts’, that is, it construes non-law as law. Only through this movement, law perceives the non-law as law and thus can limit itself in a way that leaves space for non-legal communications. Against this backdrop the authors conclude:

The attempt at understanding how these people see themselves appears to be the only promising chance, in order to reconstruct this understanding as restrictions in the respective language of the fragmented systems. The way in which the producers of traditional knowledge perceive themselves – ‘the principle of indigenous self-determination’ – should be the normative center of gravitation.<sup>47</sup>

However, in conceptualising the second fragmentation, Fischer-Lescano and Teubner still need to assume that ‘indigenous knowledge’ exists before and outside modern law. They thus seem to essentialise to a certain extent indigenous identity. This is, however, problematic for several reasons. Most importantly, this notion of indigenous knowledge does not reflect the fact that what they describe as regional and traditional cultures is already the result of a colonial encounter; it is already a description made by ‘modern law’.<sup>48</sup> In order to reflect this fact, it is necessary to take the idea of double fragmentation one step further. It is the self-characterisation of modern law as modern and functionally differentiated law that construes that which is non-modern and non-functionally differentiated as its other. Modern law thus produces its other in its self-characterisation. The dichotomy between modern law

<sup>45</sup> Teubner and Fischer-Lescano, ‘Cannibalizing Epistemes’, p. 19. <sup>46</sup> Ibid.

<sup>47</sup> Ibid., p. 31.

<sup>48</sup> Nelken formulates a similar critique with reference to Teubner’s notion of autopoiesis: ‘All this suggests that there may be some danger of autopoietic theory being insufficiently reflexive about the extent to which its ideas about legal culture are shaped by the legal culture in which it was created’, see Nelken, ‘Beyond the Metaphor of Legal Transplants?’, pp. 289–90.

and indigenous cultures is the result of modern law's self-characterisation. The non-law is conceived as something that can be translated, captured in law, but not as something that challenges the logic of law itself. This becomes evident also in *Chevron Corp. v. Ecuador*.

So far, we have been writing as if the *afectados* were a group of individuals that existed outside the law or before the law, protected by human rights law and which had experienced violations of their rights. However, the very entity of *afectados* is a legal artefact produced by a different jurisdiction – the jurisdiction of social, economic, cultural and environmental rights. Continuing to think jurisdiction in relation to political authority (or legal regimes in relation to differentiated functional systems), the jurisdiction of social, economic and cultural, as well as environmental rights evokes different values or logics than investment law. Here, the basic needs of the individual (or of a group) constitute the basic principle of the world or authority that is invoked. Against this backdrop, the call for human rights might indeed challenge the neo-liberal logic of transnational investment law. To state that the *afectados* have suffered damages and human rights violations (as is done in the Lago Agrio proceedings) authorises a different order or world, a different logic of what is considered important. Still, the human rights regime knows the *afectados* only as receivers of law. The human rights regime gives rights to the *afectados*, who are perceived as some non-legal reality. What is omitted is the fact that the *afectados* as a group exist only through law. To frame the (legal, political, economic) conflict in terms of human rights violations introduces a particular form of representation in which actors 'have rights and culture',<sup>49</sup> but no jurisdiction, that is, no competing authority that would question the human rights language. In this vein, the worldview of the indigenous population that inhabit the territory where the oil drilling took place becomes a cultural good, to be protected by law, but not able to create law itself.

This becomes manifest when the indigenous populations in the affected area are reduced to their 'culture' to bring them under the protective umbrella of rights. Whenever Ecuador invokes the rights of the *afectados* in the UNCITRAL proceedings, it portrays the group in a specific way: the life of the indigenous populations in the area before arrival of the oil companies is described as one led 'in harmony'<sup>50</sup> with the rainforest

<sup>49</sup> Pahuja, 'Laws of Encounter', p. 71.

<sup>50</sup> Track 2 Counter-Memorial on the Merits of the Republic of Ecuador, 18 February 2013, No. 26. ('Before TexPet began its oil activity in the Oriente (East) region of the



and its natural resources. To quote but one example from the Counter Memorial submitted by Ecuador:

Before TexPet began its oil activity in the Oriente (East) region of the Ecuadorian Amazon, at least eight groups of indigenous peoples lived there in harmony with the rainforest . . . Ecuador's indigenous peoples relied on the rainforest for their subsistence through hunting, gathering, and practicing sustainable agriculture. The streams, rivers, and lakes of the rainforest also were inextricably linked with their daily lives because they relied on its waters, groundwater, flora, and fauna for fishing, bathing, cooking, drinking, washing clothes, and transportation. In addition to nutritional and domestic purposes, indigenous peoples used the rainforest's elements in the preparation of traditional medicine. Sustainable agriculture, called 'chacra' or 'swidden agriculture,' also contributed to indigenous groups' ability to survive in low-density populations in the rainforest. . . Experts praise the indigenous peoples' eco-friendly system as a 'truly sustainable agriculture that is environmentally sound'.<sup>51</sup>

However, rather than actually existing before modern law, the identification with a particular worldview that requires protection is only produced as the 'other' of modernity and modern law. The ecological way of life as characteristic of the inhabitants of the Amazon is the result of their contact with the colonial population:

What are seen (and they themselves see) today as their traditions, customs and economies are indeed the sedimentation of resistances, survival strategies and adaptive response in the face of mass destruction of their ancestral communal life by modern conquerors and setters of all denominations.<sup>52</sup>

In a similar vein, Bardomiano Hernandez describes the fetishisation of their own culture as a reaction of the affected groups to the threat to their existence.<sup>53</sup> What Sergio Costa und Guilherme Leite Gonçalves write regarding the protection of afro-descendants holds true for the present context as well: the protection of indigenous groups by multicultural

Ecuadorian Amazon, at least eight groups of indigenous peoples lived there in harmony with the rainforest').

<sup>51</sup> Track 2 Counter-Memorial on the Merits of the Republic of Ecuador, 18 February 2013, No. 28, pp. 14ff.

<sup>52</sup> Santos, *Toward a New Legal Common Sense*, p. 238. For the Ecuadorian case see further Rivas and Lara, *Conservación y Petróleo*, and Davidov, 'Aguinda v. Texaco Inc.'.

<sup>53</sup> Hernández, 'Cowode'.

rights result in the construction of 'a monolithic identity defined by ancestral traits, which are treated as if they were completely immune and refractory to divisions, internal conflicts and interactions and ties with the surrounding society'.<sup>54</sup> While group rights are necessary, they need to reflect that '... any intervention of the ... law redraws the map of the identity negotiations, intervening in the constitution of the socio-cultural groups'.<sup>55</sup> Hence, the 'cultural characteristics' attributed to the affected population is not a 'reality' translated into the language of law, but the result of a legal strategy.

In her much discussed essay, 'Can the Subaltern Speak', Gayatri Spivak reminds us that in every act of representation there is an aesthetic dimension. To represent denotes both speaking for someone, but also providing an image of something or someone. Whenever I speak for a group I also speak about a group and thereby construe a 'transparent' subject as if it actually existed.<sup>56</sup> Spivak's warning about the structures of power and representation proper to academia is also relevant for the analysis of human rights litigation, something she explores in more depth in a lecture held as part of the Oxford Amnesty Lectures, later published under the title 'Righting Wrongs'. She starts her text with a discussion of the language of 'rights' and 'wrongs'. We can have rights and claim their protection, but wrongs can only be experienced. In order to be able to speak about wrongs, it is always necessary to speak of someone or something else that has produced the damage. Indeed, she observes, 'wrong' is usually used as a verb – to wrong. In relation to 'Human Wrongs' the notion of 'Human Rights' also acquires an active dimension. 'Thus', she concludes, 'Human Rights is not only about having or claiming a right or a set of rights; it is also about righting wrongs, about being the dispenser of these rights'.<sup>57</sup> Spivak refers to a divide that is inscribed into the idea of human rights. In so far as they demand that injustices should be remedied, the grammar of human rights implies a 'friendly social-Darwinist agenda' according to which the fitter population has become active in favour of those who have been wronged but who cannot speak for themselves.<sup>58</sup> 'The work of righting wrongs is shared above a class line that to some extent and unevenly cuts across race and the North-South divide'.<sup>59</sup> The relevance of this comment for

<sup>54</sup> Costa and Gonçalves, 'Human Rights as Collective Entitlement?', p. 68.

<sup>55</sup> Ibid., p. 69. <sup>56</sup> Spivak, 'Can the Subaltern Speak?', p. 271, pp. 276–7.

<sup>57</sup> Spivak, 'Righting Wrongs', pp. 523ff. <sup>58</sup> Ibid., pp. 524–5. <sup>59</sup> Ibid., pp. 525–6.

the present case is probably most obvious with regards to the dispute about the legal representation of the Huoarani people once it became public that Steven Donziger had sold shares of the legal claim without the knowledge of the plaintiffs.<sup>60</sup>

The juridification of a conflict, that is its translation into a *quaestio iuris* even in the form of subjective rights, produces its own relationships of power – in the form of personal representation as well as the representation of the social conflict at stake. It requires those engaging with the law to define themselves as legal subjects and frame their needs and interests in a way they become understandable in legal terms. In this context, it is worth noting that in Ecuador this form of identity politics around single issues (in this case environmental pollution) has been replacing broader struggles that questioned the development-oriented state politics or demanded redistribution since the 1990s.<sup>61</sup> A tendency which needs to be understood within what Nancy Fraser has called the post-socialist condition:

an absence of any credible overarching emancipatory project despite the proliferation of fronts of struggle; a general decoupling of the cultural politics of recognition from the social politics of redistribution; and a decentering of claims for equality in the face of aggressive marketization and sharply rising material 'inequality'.<sup>62</sup>

The legalisation of the situation as a conflict between the *afectados* and Chevron Corp. is the result of a selective construction of the non-law by law. In this process, a difference between the indigenous population and modern law is created in which the indigenous population is not perceived as a conflicting jurisdiction – capable of producing its own law – but as mere receiver of rights within the structure of a national state. If we draw on social, economic, and cultural rights to counter the neo-liberal jurisdiction of investment law, we have to take into account this violent relationship between law and what it construes as its other.

<sup>60</sup> *Chevron v. Donziger*, Proposed Intervenors' Memorandum of Law in support of Motion to Intervene; *Huaio v. Donziger*.

<sup>61</sup> See the contributions in Pineda and Krainer (eds.), *Periferias de la periferia*; see also Lembke, *In the Land of Oligarchs*; Korovkin, 'Between Class and Ethnicity', pp. 331–4.

<sup>62</sup> Fraser, *Justice Interruptus*, pp. 3–4, see also Torpey, who states: 'The decline of utopian politics has combined with identity politics to produce "reparations politics"'; Torpey, 'An Avalanche of History', pp. 28–9.

### From double fragmentation to the double *Entsetzung* of law

What, then, remains after the analysis carried out thus far? To repeat: with respect to the first fragmentation of law, we have come to the conclusion that the collision of different legal regimes of world law cannot be solved within investment treaty arbitration proceedings. For this would simply expand the reach of the investment regime. Mitigating conflicts between investor rights and human rights of third parties therefore requires that investment tribunals exercise their jurisdiction with self-restraint, when human rights of third parties are affected. The problem of the second fragmentation, that is, the confrontation of the so-called modern law with so-called regional cultures, is that modern law applies the logic of a functionally differentiated law to non-functionally differentiated sectors of society. The double fragmentation of law thus raises the question whether law can have an emancipatory potential<sup>63</sup> at all for the conflicts displayed in *Chevron Corp. v. Ecuador*. Against this background it seems as if law has nothing to offer for an emancipatory critique of the underlying conflicts of the case. However, an emancipatory critique of law cannot consist in negating or suspending the law.<sup>64</sup> For the suspension of law would deprive the *afectados* of any chance to receive justice. An emancipatory critique would instead require an enactment of law that does *justice* to its double fragmentation. Drawing on Walter Benjamin's concept of the *Entsetzung* of law<sup>65</sup>, and Christoph Menke's studies on law and violence<sup>66</sup> and law and form,<sup>67</sup> we propose that a double *Entsetzung* of the law would allow for an emancipatory enactment of law.

In his essay 'Critique of Violence', Benjamin writes:

On the breaking of this cycle maintained by mythical forms of law, on the suspension [*Entsetzung*] of law with all the forces on which it depends as they depend on it, finally therefore on the abolition of state power, a new historical epoch is founded.<sup>68</sup>

As Menke points out, the notion of '*Entsetzung*' goes beyond the English translation of suspension.<sup>69</sup>

<sup>63</sup> See Fischer-Lescano, 'Systemtheorie als kritische Gesellschaftstheorie'.

<sup>64</sup> Menke, 'Law and Violence'; Menke, *Recht und Gewalt*, p. 63.

<sup>65</sup> Benjamin, 'Critique of Violence'.

<sup>66</sup> Menke, 'Law and Violence'; Menke, *Recht und Gewalt*. <sup>67</sup> Menke in this volume.

<sup>68</sup> Benjamin, 'Critique of Violence', p. 300. <sup>69</sup> Menke, 'Law and Violence', p. 13.

The German term *Entsetzung* has a double meaning . . . For *Entsetzung* means both to depose someone from an office or honour and to lift the military occupation of a town or fortress. *Entsetzung* of law thus means that it is deposed from the office it currently occupies, and *at the same time* released from a power besieging it.<sup>70</sup>

Thus, for Menke, the *Entsetzung* of law does not mean to abolish the law,<sup>71</sup> but deposing and liberating it from its inherent violence.<sup>72</sup> This however would require a different way of enacting the law. Such an enactment of the law would require, according to Menke, a law that becomes self-reflective. A self-reflective enactment of law would reiterate internally the distinction between law and non-law and would be constantly reminded of the fact that the law itself originates in its distinction from non-law.<sup>73</sup> Thus, the *Entsetzung* of law as deposing and liberating the law from its inherent violence requires a self-reflective enactment of law. When we relate this formal determination of law as a self-reflective enactment, to our analysis of the underlying conflicts of *Chevron Corp. v. Ecuador*, we can identify two different forms or instantiations of an *Entsetzung* of law representing the two fragmentations of law.

### *The Entsetzung of law I*

As indicated above, investment law enacts the law according to the requirements of its specific internal rationality. It suppresses the interests of the *afectados* and thereby enforces *en passant* certain hegemonic interests against societal resistance. The first deposition (*Entsetzung*) of law would here consist in a self-reflective enactment of investment law according to which investment law would experience its rationality as one among several and potentially equally legitimate rationalities within world law. This would confront an investment panel internally with the question whether it is the legal regime of investment law that should be the judge of the societal conflict at hand or whether it should abstain

<sup>70</sup> Menke, 'Law and Violence', p. 13 (footnotes omitted, italics in the original).

<sup>71</sup> Menke, *Recht und Gewalt*, p. 63. <sup>72</sup> Menke, 'Law and Violence', p. 13.

<sup>73</sup> This is a rough translation of this passage: 'Die Selbstreflexion des Rechts besteht darin, die Entgegensetzung des Rechts zum Nichtrechtlichen, durch die sich das Recht hervorbringt, im Recht zu wiederholen; das selbstreflexive Recht „weiß“ – was das nicht selbstreflexive . . . Recht beständig vergisst –, dass es selbst durch seine Unterscheidung das Nichtrechtliche, gegen das es sich durchsetzen muss, erst hervorgebracht hat'. Menke, *Recht und Gewalt*, p. 69.

from judging. The self-reflective enactment of law therefore opens up the option to abstain from judging; that is, to depose itself from its legal authority over the societal conflict. Considering human rights then does not mean to decide a case within the framework of investment law, but rather setting the case free from investment law's rationality. But reflecting on its inherent rationality also bears the potential of an investment law that wants to be different, an investment law that internally opposes its own rationality.<sup>74</sup> For a self-reflective enacting of investment law would also confront investment law internally with its colonial past and its hegemonic position within world law. An enactment of investment law in the face of its inherent violence can thereby develop what Menke calls, with reference to Adorno, *distaste against itself*.<sup>75</sup> Such distaste renders possible internal opposition and internal politicisation of investment law. Without societal pressure, however, such a distaste may not be developed or be without consequences. Never the less, it would serve as a reminder that investment laws' rationality, its design and principles, are not set in stone. A self-reflective inner distaste constantly challenges the current status of investment law and demands a different investment law, an investment law to come.<sup>76</sup> This would be a law that does not serve only to protect investor's rights, but an investment law that would understand the needs of the local population, of environmental protection, of societal interests as realisation of the rationality of investment protection itself.<sup>77</sup> Thus, with reference to the first fragmentation of law in *Chevron Corp. v. Ecuador* the *Entsetzung* of investment law would consist in a self-reflective enacting of the law according to which investment law abstains from judging, freeing itself from authority over a societal conflict.

### *The Entsetzung of law II*

Parallel to the first fragmentation of law, which demands a reflection on the relationship between different legal regimes, the second fragmentation requires a reflection of law's relationship to the non-law. Here, the suspension of law would consist in an inner legal reflection of law's

<sup>74</sup> See for the notion of self-opposition of law: Fischer-Lescano, *Rechtskraft*.

<sup>75</sup> See Menke, *Recht und Gewalt*, pp. 102–3.

<sup>76</sup> This concept of the 'law to come' draws on Derrida, *Rogues*.

<sup>77</sup> See, for a related concept with reference to the market for OTC Derivatives: Horst, 'Politiken der Entparadoxierung', pp. 193ff.

relationship to non-law. If representing those affected by investment arbitration in the form of subjects' human rights seems to be the only way of recognising them in law at all, to simply abolish human rights doesn't seem to offer any emancipatory way out of the dilemma.<sup>78</sup> We suggested above that, as a strategic decision, translating a social conflict into the *quaestio iuris*<sup>79</sup> can help articulating counter-hegemonic interests. The task for an emancipatory legal practise would be to enact the law in a way that reflects the process of juridification itself, that is the construction of something as non-law in the course of the legal process. To paraphrase Christoph Menke, law never refers to events or actors in the 'real world', but only to their legalised representations.<sup>80</sup>

The self-reflection of law we propose here would uncover that, in enacting the law, the ascriptions necessary for the legalisation of societal conflicts are made by law itself. This would also mean that law realises that the very distinction between law and non-law is generated only in the process of generating the law. Such a self-reflective enactment of law, however, does not overturn the fissure between law and non-law. There is no immediate reconciliation of law and life.<sup>81</sup> Again, what a self-reflective enactment of law offers is a law where the legal ascriptions and the juridification of social conflicts as well as the distinction between law and non-law are made visible, and thus can be contested, challenged and opposed. When law's authority over non-law depoliticises a social conflict in that it frames it as merely a legal question (and not as a problem of redistribution etc.), a self-reflective law has the potential to bring into relief the politics involved in the depoliticising effects of juridification. A self-reflective enactment of law knows of the contingency of its own construction of the non-law.

What would this mean in the context of the case discussed in this chapter? The legal proceedings of *Chevron Corp. v. Ecuador* translate a multidimensional conflict encompassing conflicts between different modes of production, different ways of living, different ways of belonging to law, different classes, subjects and regions into a legal language. Yet, this process of framing is not reflected. Rather, the Hourani people are presented as nature-related population that had always been there, the

<sup>78</sup> In this vein, Buckel states that critical legal theory shows that the ambivalence of law to simultaneously maintain existing power relations and protect against oppression is characteristic of the form of law: Buckel in this volume.

<sup>79</sup> See Fischer-Lescano and Teubner, *Regime-Kollisionen*, p. 87.

<sup>80</sup> Menke in this volume. <sup>81</sup> See Menke, 'Law and Violence', p. 14.

problem being the pollution, not the insertion of the rain forest into a global capitalist economy. The legal documents produced in the context of *Chevron Corp. v. Ecuador* testify to the tendency of the human rights language to truncate the systematic analysis of the origin of conflict and thereby also the way remedies are thought.<sup>82</sup> While a strategic use of human rights language can of course help to draw attention to certain problems, not to reflect the limits that come with the very concepts of human rights might perpetuate the very relations of power underlying the conflict: economic and colonial.

A self-reflective enactment of law, then, would keep this multidimensionality visible within law. Framing the conflict at hand as a legal conflict between investor rights on the one hand and human and environmental rights on the other, becomes but only one (contestable) translation of the social conflict. Such a law can take into account that the 'othering' of the affected as '*afectados*' and '*indigenas*' in tune with nature is a legal reduction of the underlying conflict under the auspices of a specific legality. The question whether a certain group of '*afectados*' has a legal claim against Chevron for compensation for damages then is only one of many questions the law is confronted with while dealing with the claim.

The representation of the non-legal in and through law always remains a legal construction. However, when law commits itself in its self-reflection to constant irritation it makes its boundaries visible and thereby contestable. This way law can become a medium for the societal negotiation of social conflicts, whose grammar is not predetermined. This would be a law that would transform itself in the face of the social conflict as well as transforming the social conflict.

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<sup>82</sup> Kennedy, 'The International Human Rights Movement'; Marks, 'Human Rights and Root Causes'.



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